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U.S. Customs Service

U.S. Court of Appeals for the Federal Circuit

and

U.S. Court of International Trade

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DEPARTMENT OF THE TREASURY
U.S. CUSTOMS SERVICE

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U.S. Customs Service

Treasury Decision

19 CFR Part 151

(T.D. 93–52)

EXAMINATION OF WOOL AND HAIR

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Final rule.

SUMMARY: This document adopts as a final rule without change proposed amendments to the Customs Regulations to remove references to estimation of clean yield of wool or hair by non-laboratory method and to eliminate Customs Form 6451, Notice of Percentage Clean Yield and Grade of Wool or Hair. The amendments conform the regulations to current Customs procedures which no longer include informally estimating the clean yield of wool or hair and notifying the importer of that estimate. Determination of the clean yield of wool or hair will thus be made on a case-by-case basis only through analysis performed in a Customs or commercial laboratory.

EFFECTIVE DATE: August 13, 1993.

FOR FURTHER INFORMATION CONTACT: Ira Reese, Office of Laboratories and Scientific Services (202–927–1060).

SUPPLEMENTARY INFORMATION:

BACKGROUND

On August 21, 1992, Customs published a notice in the Federal Register (57 FR 37917) proposing to amend various sections within Subpart E of Part 151, Customs Regulations (19 CFR Part 151), which covers examination and testing procedures applicable to imported wool and hair for tariff purposes. The proposed amendments were intended specifically to ensure that the regulations reflect current requirements and procedures regarding the determination of clean yield: if a clean yield content report is needed for Customs purposes, Customs samples and analyses the crude wool for clean yield content in a Customs laboratory specializing in wool analysis and, when a Laboratory Report is issued on

Customs Form 6415, a copy thereof is sent by Customs to the importer of record. The specific amendments proposed in the notice involved (1) removal of section 151.72 which provides for estimation of clean yield by non-laboratory method and specifies use of Customs Form 6451 as the means for notification to the importer, and (2) conforming changes to other sections of the regulations involving removal of all references: to Customs Form 6451; section 151.72; an examination or estimation procedure (which in the regulatory texts has reference only to a non-laboratory procedure); and importer notification of the results of an examination or estimation procedure. As a consequence of the proposed amendments, the present regulatory provisions regarding laboratory sampling and analysis (which also provide for analysis by a commercial laboratory under certain circumstances) would become the sole means under the regulations for determination of clean yield content.

One comment was received from the public in response to the notice. This commenter supported the proposed amendments and further suggested that the Customs Commercial Laboratory Program should be expanded to include accreditation for wool testing so as to eliminate the need for retesting. Customs does not believe that any action should be taken in response to this comment because (1) the comment is outside the scope of the proposed amendments, and (2) based on the relatively small number of wool analyses performed each year in Customs laboratories and based on the absence of any requests for retesting of wool samples over the last several years, the accreditation of commercial laboratories to perform wool testing is neither necessary nor appropriate.

Based on the above, Customs believes that the proposed amendments should be adopted as a final rule without change.

Regulatory Flexibility Act

Pursuant to the provisions of the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*), it is certified that the regulations amendments will not have a significant economic impact on a substantial number of small entities. The amendments merely conform the regulations to present administrative practice and thus will not result in any increased economic impact. Accordingly, these amendments are not subject to the regulatory analysis or other requirements of 5 U.S.C. 603 and 604.

Executive Order 12291

This document does not meet the criteria for a "major rule" as specified in E.O. 12291. Accordingly, no regulatory impact analysis has been prepared.

Drafting Information

The principal author of this document was Francis W. Foote, Regulations Branch, U.S. Customs Service. However, personnel from other offices participated in its development.

LIST OF SUBJECTS IN 19 CFR PART 151

Customs duties and inspection, Imports, Examination, sampling and testing, Wool.

AMENDMENTS TO THE REGULATIONS

Accordingly, Part 151, Customs Regulations (19 CFR Part 151), is amended as set forth below:

PART 151—EXAMINATION, SAMPLING, AND TESTING OF MERCHANDISE

1. The authority citation for Part 151 continues to read in part as follows:

Authority: 19 U.S.C. 66, 1202 (General Notes 8 and 9, Harmonized Tariff Schedule of the United States), 1624. * * *

Subpart E also issued under Additional U.S. Note 2(f) to Chapter 51, HTSUS. * * *

* * * * * * *

2. Section151.64 is revised to read as follows:

§ 151.64 Extra copy of entry summary.

One extra copy of the entry summary covering wool or hair subject to duty at a rate per clean kilogram shall be filed in addition to the copies otherwise required.

3. Section 151.70, first sentence, is amended by removing at the end the words, "in which case the clean yield of the wool or hair in such sampling unit shall be estimated as provided for in § 151.72".

4. Section 151.71 is amended by revising paragraphs (a) and (b) to read as follows:

§ 151.71 Laboratory testing for clean yield.

(a) *Test and report by Customs laboratory.* The clean yield of all general samples taken in accordance with § 151.70 shall be determined by test in a Customs laboratory, unless it is found that it is not feasible to test such a sample and obtain a proper finding of percentage clean yield. A report of the percentage clean yield of each general sample as established by the test, or a statement of the reason for not testing a general sample, shall be forwarded to the district director.

(b) *Notification to importer.* Where samples of wool or hair have been tested in a Customs laboratory and the district director has received a copy of the Laboratory Report, Customs Form 6415, the district director shall promptly provide notice of the test results by mailing a copy of that report to the importer.

* * * * * * *

5. Section 151.72 is removed.

6. Section 151.73 is amended by removing from paragraph (a) the words "or a reestimation of clean yield made in accordance with § 151.72(c),".

7. Section 151.73 is further amended by removing from paragraph (b) the words "or reexamination".

8. Section 151.75 is amended by removing the words "and examinations".

GEORGE J. WEISE,
Commissioner of Customs.

Approved: June 25, 1993.
RONALD K. NOBLE,
Assistant Secretary of the Treasury

[Published in the Federal Register, July 14, 1993 (58 FR 37853)]

(T.D. 93-53)

REVOCATION OF CUSTOMS BROKER LICENSE

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: General notice.

SUMMARY: Notice is hereby given that on July 6, 1993, the Secretary of the Treasury, pursuant to Section 641, Tariff Act of 1930, as amended, (19 U.S.C. 1641), and Part 111.74 of the Customs Regulations, as amended (19 CFR 111.74), ordered the revocation of the license (11178) issued to Laurel B. Arain in the New York Customs District to conduct Customs business.

Dated: July 9, 1993.

PHILIP METZGER,
Director,
Office of Trade Operations.

[Published in the Federal Register, July 14, 1993 (58 FR 37988)]

(T.D. 93-54)

SURRENDER OF CUSTOMS BROKER LICENSE

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: General notice.

SUMMARY: Notice is hereby given that on September 4, 1992, the Secretary of the Treasury, pursuant to Section 641, Tariff Act of 1930, as amended, (19 U.S.C. 1641), and Part 111.51(b) of the Customs Regulations, as amended (19 CFR 111.51(b)), accepted the surrender of the license issued to Joseph Jacovina (no. 3294) in the New York Customs Region to conduct Customs business.

Dated: July 13, 1993.

PHILIP METZGER,
Director,
Office of Trade Operations.

[Published in the Federal Register, July 20, 1993 (58 FR 38809)]

(T.D. 93-55)

SURRENDER OF CUSTOMS BROKER LICENSE

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: General notice.

SUMMARY: Notice is hereby given that on September 4, 1992, the Secretary of the Treasury, pursuant to Section 641, Tariff Act of 1930, as amended, (19 U.S.C. 1641), and Part 111.51(b) of the Customs Regulations, as amended (19 CFR 111.51(b)), accepted the surrender of the license issued to Wood, Niebuhr & Co. (no. 4814) in the New York Customs Region to conduct Customs business.

Dated: July 13, 1993.

PHILIP METZGER,
Director,
Office of Trade Operations.

[Published in the Federal Register, July 20, 1993 (58 FR 38810)]

(T.D. 93–56)

SUSPENSION OF INDIVIDUAL CUSTOMS BROKER LICENSE NO. 6707; ENRIQUE WISMANN

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: General notice.

SUMMARY: Notice is hereby given that on June 21, 1993, the Secretary of the Treasury, pursuant to Section 641, Tariff Act of 1930, as amended, (19 U.S.C. 1641), and Part 111.74 of the Customs Regulations, as amended (19 CFR 111.74), suspended the individual broker license no. 6707 issued to Enrique Wismann for a period of 180 days. This action is effective as of June 22, 1993.

Dated: July 13, 1993.

PHILIP METZGER,
Director,
Office of Trade Operations.

[Published in the Federal Register, July 20, 1993 (58 FR 38810)]

U.S. Customs Service

Proposed Rulemaking

19 CFR Parts 12, 24, 133, and 178

RIN-1515-AA81

ENFORCEMENT OF PROTECTION OF SEMICONDUCTOR CHIP PRODUCTS; PATENT SURVEYS; WITHDRAWAL

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Proposed rule; withdrawal.

SUMMARY: This document withdraws the proposed amendments to the Customs Regulations, which would have enabled persons seeking protection from infringing semiconductor chip products (mask works) to obtain the assistance of Customs in preventing pirated chips from being imported into the United States. The mask work owner's remedy against infringing imports in these circumstances will continue to be the right to seek an injunction against importation from a district court or an exclusion order from the U.S. International Trade Commission (USITC).

EFFECTIVE DATE: The withdrawal is effective on July 14, 1993.

FOR FURTHER INFORMATION CONTACT: Timothy P. Trainer, Intellectual Property Rights Branch, (202-482- 6960).

SUPPLEMENTARY INFORMATION:

BACKGROUND

The Semiconductor Chip Protection Act of 1984, as amended, 17 U.S.C. 901-914, (the Act) provides for protection of mask works that are fixed in semiconductor chip products. A mask work is defined as a series of related images, however fixed or encoded, that represent the three-dimensional patterns in the layers of a semiconductor chip. It is fixed in a semiconductor chip product when its embodiment in the product is sufficiently permanent or stable to permit the mask work to be perceived or reproduced from the product for a period of more than transitory duration.

The owner of a registered mask work has the exclusive right, under 17 U.S.C. 905, to reproduce it and to import and distribute a semiconductor chip product in which the mask work is embodied.

Under 17 U.S.C. 910(c), the Secretary of the Treasury was empowered to issue regulations for the protection of the rights of mask work owners with respect to infringing importations. Under the Act, these regulations may require, as a condition of the exclusion of articles from the United States, that the person seeking exclusion take any one or more of the following actions:

(1) Obtain a court order enjoining, or an order of the U.S. International Trade Commission (USITC) under § 337, Tariff Act of 1930 (19 U.S.C. 1337), excluding, importation of the articles;

(2) Furnish proof that the mask work involved is protected under 17 U.S.C. 905 and that importation of the articles would infringe the rights of the mask work owner; and/or

(3) Post a surety bond for any injury that might result if the detention or exclusion proves to be unjustified.

In a final rule document published in the Federal Register on October 21, 1987 (52 FR 39217), Customs considered all three of the options for the protection of the mask work owner's rights, and decided to proceed under option (1). Section 12.39 of the Customs Regulations (19 CFR 12.39) was duly amended to add a new paragraph (d), requiring that persons seeking exclusion of infringing semiconductor chip products first obtain a court order enjoining, or an order of the USITC excluding, importation of the articles. Exclusion orders issued by the USITC would be enforceable under § 12.39(b), Customs Regulations (19 CFR 12.39(b)).

However, on October 4, 1989, Customs published in the Federal Register (54 FR 40882), a notice of proposed rulemaking soliciting public comment on proposed amendments to the Customs Regulations, which, in principal part, would have enabled the owner of rights in a mask work to obtain the assistance of Customs in preventing pirated chips from being imported into the United States. This remedy would have been in addition to the mask work owner's option to request Customs to enforce an order from a court or the USITC. Furthermore, under the proposed rulemaking, Customs would have been empowered to seize articles on its own initiative which in its view were clearly infringing the exclusive rights of the owner of a protected mask work.

Discussion of Comments

Ten comments were received in response to the notice of proposed rulemaking. Several commenters strenuously objected to the proposed amendments, and none of the comments favored seizures by Customs on its own initiative. The commenters generally questioned how a district director of Customs would determine the existence of a clearly infringing article, and further asserted that Customs lacked the essential expertise to make such determinations on its own. A number of these commenters were also concerned that ex parte seizures by Customs would pose a serious risk of economic injury resulting from the detention of shipments while Customs investigated whether mask work infringement in fact existed.

In addition, the commenters generally were opposed to the proposed procedures to be followed when the district director suspected that importations of infringing mask works were taking place. Some commenters believed that the proposal violated both the General Agreement on Tariffs and Trade as well as the U.S.-Canada Free Trade Agreement because it would unduly burden and restrict imports. Specifically, it was stated that a mask work owner under the proposal could disrupt imports for a long period and with little risk. Similarly, some commenters thought the proposal did not meet due process requirements.

Moreover, since the passage of the Act in 1984, Customs is aware of only one case brought thereunder involving protection of mask works and that case was against a domestic producer.

It is believed that the comments submitted point out persuasive reasons militating against adoption of the proposal, and that, on balance, the current regulations appear to be sufficient to reasonably ensure enforcement of the Act, while meeting the overall concerns of the trade.

WITHDRAWAL OF PROPOSAL

In view of the foregoing, and after consideration of the comments received and further review of the matter, Customs has determined to withdraw the notice of proposed rulemaking published in the Federal Register on October 4, 1989 (54 FR 40882).

DRAFTING INFORMATION

The principal author of this document was Russell Berger, Regulations Branch, U.S. Customs Service. However, personnel from other offices participated in its development.

GEORGE J. WEISE,
Commissioner of Customs

Approved: June 25, 1993.
RONALD K. NOBLE,
Assistant Secretary of the Treasury.

[Published in the Federal Register, July 14, 1993 (58 FR 37884)]

United States Court of International Trade

One Federal Plaza

New York, N.Y. 10007

Chief Judge

Dominick L. DiCarlo

Judges

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Jane A. Restani
Thomas J. Aquilino, Jr.
Nicholas Tsoucalas
R. Kenton Musgrave
Richard W. Goldberg

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James L. Watson

Herbert N. Maletz

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Decisions of the United States Court of International Trade

(Slip Op. 93–125)

TORRINGTON CO., PLAINTIFF, AND FEDERAL-MOGUL CORP., PLAINTIFF-INTERVENOR *v.* UNITED STATES, DEFENDANT, AND SKF USA INC., SKF INDUSTRIE, S.p.A., AND FAG CUSCINETTI S.p.A., DEFENDANT-INTERVENORS

Court No. 91–08–00568

Plaintiff moves pursuant to Rule 56.1 of the Rules of this Court for judgment on the agency record challenging the following actions by the Department of Commerce, International Trade Administration ("ITA"), alleging that these actions were unsupported by substantial evidence on the administrative record and not in accordance with law: the ITA's (1) use of a methodology for adjusting United States price ("USP") and Foreign Market Value ("FMV") for Italy's value added tax ("VAT") that granted a circumstance of sale ("COS") adjustment to FMV to achieve tax neutrality; (2) method of calculating cash deposit rates for estimated duties; (3) in regard to ESP transactions, allowance of an adjustment to FMV for inventory carrying costs; (4) failure to verify FAG Cuscinetti S.p.A.'s ("FAG") cost response; (5) adjustment to FMV for FAG's pre-sale inland freight; (6) treatment of SKF Industrie, S.p.A. and SKF Cuscinetti's home market discounts; and (7) treatment of FAG's U.S. market discounts.

Held: This case is remanded to the ITA to add the full amount of VAT paid on each sale in the home market to FMV without adjustment; to determine if SKF's two methods of reporting discounts in the home market for SKF Cuscinetti and SKF Industrie, S.p.A. meet the standard required for those discounts to be treated as direct selling expenses and subtracted from FMV or if information on the administrative record does not support deduction as direct expenses, to treat these discounts as indirect selling expenses; to develop a methodology which removes discounts paid on sales of out of scope merchandise from any adjustments made to FMV for SKF's discounts or, if no viable method can be developed, to deny such an adjustment in its calculation of FMV; and to develop a methodology which removes discounts paid on FAG's sales of out of scope merchandise from any adjustments made to USP for discounts or, if no viable method can be developed, to deny such an adjustment in its calculation of USP. ITA's determination is affirmed in all other respects.

[Plaintiff's motion granted in part and denied in part; case remanded.]

(Dated July 8, 1993)

Stewart and Stewart (*Eugene L. Stewart, Terence P. Stewart, James R. Cannon, Jr., Geert De Prest, Margaret E. O. Edozien, William A. Fennell, Wesley K. Caine, Myron A. Brilliant, Robert A. Weaver, Patrick J. McDonough* and *Amy S. Dwyer*) for plaintiff.

Frederick L. Ikenson, P.C. (*Frederick L. Ikenson, J. Eric Nissley* and *Joseph A. Perna, V*) for plaintiff-intervenor Federal-Mogul Corporation.

Frank W. Hunger, Assistant Attorney General; *David M. Cohen,* Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice (*Velta A. Melnbrencis* and *Jane E. Meehan*); of counsel: *John D. McInerney,* Acting Deputy Chief Counsel for Import Administration, *Dean A. Pinkert, Stephen J. Claeys, D. Michael Kaye* and *Douglas S.*

Cohen, Attorney-Advisors, Office of the Chief Counsel for Import Administration, U.S. Department of Commerce, for defendant.

Howrey & Simon (Herbert C. Shelley, Scott A. Scheele, Alice A. Kipel, Thomas J. Trendl and *Juliana M. Cofrancesco)* for defendant-intervenors SKF USA Inc. and SKF Industrie, S.p.A.

Grunfeld, Desiderio, Lebowitz & Silverman (Max F. Schutzman, David L. Simon, Andrew B. Schroth and *Matthew L. Pascocello)* for defendant-intervenor FAG Cuscinetti S.p.A.

Opinion

TSOUCALAS, *Judge:* Plaintiff, The Torrington Company ("Torrington"), moves pursuant to Rule 56.1 of the Rules of this Court for judgment on the agency record, challenging certain aspects of the Department of Commerce, International Trade Administration's ("ITA") final results in the first administrative review of imports of antifriction bearings from Italy. *Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof From Italy; Final Results of Antidumping Duty Administrative Reviews ("Final Results")*, 56 Fed. Reg. 31,751 (1991). Substantive issues raised by the parties in the underlying administrative proceeding were addressed by the ITA in the issues appendix to *Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof From the Federal Republic of Germany; Final Results of Antidumping Duty Administrative Review ("Issues Appendix")*, 56 Fed. Reg. 31,692 (1991).

Background

On June 11, 1990, the ITA initiated an administrative review of imports of ball bearings, cylindrical roller bearings and parts thereof from Italy. *Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof From the Federal Republic of Germany, France, Italy, Japan, Romania, Singapore, Sweden, Thailand and the United Kingdom Initiation of Antidumping Administrative Reviews,* 55 Fed. Reg. 23,575 (1990).

On March 15, 1991, the ITA published its preliminary determination in the administrative review. *Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts thereof from Italy: Preliminary Results of Antidumping Duty Administrative Reviews and Partial Termination of Administrative Reviews,* 56 Fed. Reg. 11,181 (1991).

On July 11, 1991, the ITA published its Final Results in this proceeding. *Final Results,* 56 Fed. Reg. 31,751.

Torrington moves pursuant to Rule 56.1 of the Rules of this Court for summary judgment on the agency record alleging that the following actions by the ITA were unsupported by substantial evidence on the administrative record and not in accordance with law: the ITA's (1) use of a methodology for adjusting United States price ("USP") and Foreign Market Value ("FMV") for Italy's value added tax ("VAT") that granted a circumstance of sale ("COS") adjustment to FMV to achieve tax neutrality; (2) method of calculating cash deposit rates for estimated duties; (3) in regard to exporter's sales price ("ESP") transactions, allowance of

an adjustment to FMV for inventory carrying costs; (4) failure to verify FAG Cuscinetti S.p.A.'s ("FAG") cost response; (5) adjustment to FMV for FAG's pre-sale inland freight; (6) treatment of SKF Industrie, S.p.A. and SKF Cuscinetti's ("SKF") home market discounts; and (7) treatment of FAG's U.S. market discounts. *Memorandum in Support of Plaintiff's Motion for Judgment Upon the Agency Record* (*"Torrington's Memorandum"*) at 5–40.

DISCUSSION

This Court's jurisdiction over this matter is derived from 19 U.S.C. § 1516a(a)(2) (1988) and 28 U.S.C. § 1581(c) (1988).

A final determination by the ITA in an administrative proceeding will be sustained unless that determination is "unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B) (1988). Substantial evidence is "relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Consolidated Edison Co. v. NLRB,* 305 U.S. 197, 229 (1938); *Alhambra Foundry Co. v. United States,* 12 CIT 343, 345, 685 F. Supp. 1252, 1255 (1988).

1. *Circumstance of Sale Adjustment to FMV for Value Added Tax:*

Torrington challenges the ITA's use of a methodology for adjusting USP and FMV for Italy's VAT that granted a COS adjustment to FMV to achieve tax neutrality. *Torrington's Memorandum* at 10–14.

Defendant argues that its actions were supported by substantial evidence on the administrative record and otherwise in accordance with law. *Defendant's Memorandum in Opposition to Plaintiff's Motion for Judgment Upon the Agency Record* (*"Defendant's Memorandum"*) at 13–39.

For a more detailed discussion of Torrington and defendant's arguments on this issue, see this Court's decision in *Torrington Co. v. United States,* 17 CIT ____, ____, Slip Op. 93–44 at 7-12 (March 29, 1993).

SKF and FAG essentially agree with the defendant's arguments on this issue. *Opposition of SKF USA Inc. and SKF Industrie. S.P.A. to Torrington's Motion for Judgment on the Agency Record* (*"SKF's Opposition"*) at 8–12; *Memorandum of Defendant-Intervenor FAG Cuscinetti S.p.A. ("FAG") in Opposition to Plaintiff's Motion for Judgment Upon the Agency Record* (*"FAG's Memorandum"*) at 24–29.

This Court has fully addressed these arguments and adheres to its decision on this issue in *Federal-Mogul Corp. v. United States,* 17 CIT ____, ____, Slip Op. 93–17 at 15–22 (Feb. 4, 1993). This Court remands this issue to the ITA to allow the ITA to add the full amount of VAT paid on home market sales to FMV without adjustment in conformity with this Court's opinion in *Federal-Mogul,* 17 CIT at ____, Slip Op. 93–17 at 41.

2. *Calculation of Cash Deposit Rates:*

In this administrative review, the ITA used two different methodologies for the actual calculation of dumping margins in cases where ESP

sales were used: one for assessing duties on entries covered by the review, and the other for setting the cash deposit rate on future entries of the subject merchandise. *Final Results,* 56 Fed. Reg. at 31,753–54; *Issues Appendix,* 56 Fed. Reg. at 31,698–702. To calculate the assessment rate for ESP sales, the ITA "divide[d] the total PUDD [potential uncollected dumping duties—calculated as the total difference between foreign market value and U.S. price for an exporter] for the reviewed sales by the *total entered value* of those reviewed sales * * *." *Issues Appendix,* 56 Fed. Reg. at 31,698–99 (emphasis added). To calculate the estimated cash deposit rate for ESP sales, the ITA "divided the total PUDD for each exporter by the *total net U.S. price* for that exporter's sales * * *." Id. at 31,699 (emphasis added).

Torrington argues that the ITA's use of a methodology which results in an estimated cash deposit rate different from the assessment duty rate was unsupported by substantial evidence on the record and not in accordance with law. *Torrington's Memorandum* at 5–10.

Defendant argues that its actions were supported by substantial evidence on the administrative record and otherwise in accordance with law. *Defendant's Memorandum* at 6–13. In addition, defendant argues that this issue is moot because of the publication of superseding cash deposit rates in *Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof From France; et al.; Final Results of Antidumping Duty Administrative Reviews,* 57 Fed. Reg. 28,360 (1992). *Defendant's Memorandum* at 3–6.

For a more detailed discussion of Torrington and defendant's arguments on this issue, see this Court's decision in *Torrington Co.,* 17 CIT at ____, Slip Op. 93–44 at 12–14.

SKF and FAG essentially agree with the defendant's arguments on this issue. *SKF's Opposition* at 4–8; *FAG's Memorandum* at 11–23.

The Court agrees with the defendant that this issue is now moot. However, the Court directs the defendant to this Court's decision on this issue in *Federal-Mogul,* 17 CIT at ____, Slip Op. 93–17 at 24–29.

3. *Inventory Carrying Costs:*

In the Final Results of this administrative review the ITA correctly adjusted ESP for imputed inventory carrying costs pursuant to 19 U.S.C. § 1677a(e)(2) (1988). Torrington does not challenge this adjustment.

Pursuant to its new administrative practice, the ITA also made a corresponding adjustment to FMV for imputed inventory carrying costs when comparing ESP sales to FMV sales.

Torrington objects to this adjustment by the ITA to FMV for imputed inventory carrying costs. *Torrington's Memorandum* at 20–26.

For a detailed discussion of Torrington and defendant's arguments on this issue, see this Court's decision in *Torrington Co.,* 17 CIT at ____, Slip Op. 93–44 at 27–31.

SKF and FAG essentially agree with the defendant's arguments on this issue. *SKF's Opposition* at 12–16; *FAG's Memorandum* at 48–60.

This Court adheres to its decision on this issue in *Torrington Co.*, 17 CIT at ____, Slip Op. 93–44 at 31–34, and finds that the ITA's adjustment to FMV for imputed inventory carrying costs pursuant to 19 C.F.R. § 353.56(b)(2) (1991) was a reasonable exercise of the ITA's discretion in implementing the antidumping duty statute and is affirmed.

4. *Failure to Verify FAG's Cost Response:*

On October 4, 1990, Torrington requested the ITA to conduct verification of all responses submitted in this administrative review, including FAG's cost response, pursuant to 19 U.S.C. § 1677e(b) (1988) and 19 C.F.R. § 353.36 (1991).[1] Administrative Record Italy Public Document No. ("AR Italy Pub. Doc. No.") 123. FAG had not yet submitted its cost response to the ITA. AR Italy Pub. Doc. Nos. 128, 134.

After FAG submitted its cost response, Torrington renewed its request for verification alleging that FAG's cost response was missing important information and that some of the information reported was inconsistent. AR Italy Pub. Doc. No. 213.

In a letter dated January 25, 1991, Torrington refers to the ITA's decision to cancel verification of FAG's cost response, alleging that it was due in part to the outbreak of the Persian Gulf War, and goes on to request the ITA to reschedule the verification or conduct limited verification in Washington, D.C. AR Italy Pub. Doc. No. 216. However, evidence on the administrative record shows that the ITA had never scheduled verification of FAG's cost response in Italy, but that the ITA planned to conduct limited verification of FAG's cost response at verification of FAG-Germany. AR Italy Pub. Doc. No. 218. The ITA refused Torrington's request to reschedule verification or conduct limited verification in Washington, D.C.

Torrington argues that 19 U.S.C. § 1677e(b)(3)(B) requires the ITA to verify all information used in an administrative review "if good cause for

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[1] 19 U.S.C. § 1677e(b) states in pertinent part:

b) Verification

The administering authority shall verify all information relied upon in making—

* * * * * * *

(3) a review and determination under section 1675(a) of this title, if—

(A) verification is timely requested by an interested party * * * and

(B) no verification was made under this paragraph during the 2 immediately preceding reviews and determinations under that section of the same order, finding, or notice, *except that this clause shall not apply if good cause for verification is shown.*

(Emphasis added).

Since this was the first review of the outstanding antidumping duty order regarding antifriction bearings from Italy, the ITA was only required to conduct verification if timely requested by an interested party and only if good cause for verification was shown.

The relevant section of the ITA's regulations state:

§ 353.36 Verification of information.

(a) *In general.* (1) The Secretary will verify all factual information the Secretary relies on in:

* * * * * * *

(iv) The final results of an administrative review under § 353.22(c) or (f) if the Secretary decides that good cause for verification exist; and

(v) The final results of an administrative review under § 353.22(c) if:

(A) An interested party * * * not later than 120 days after the date of publication of the notice of initiation of review, submits a written request for verification; and

(B) The Secretary conducted no verification under this paragraph during either of the two immediately preceding administrative reviews.

19 C.F.R. § 353.36.

verification is shown." Torrington cites to the House of Representatives Ways and Means Committee's report on the Trade Remedies Reform Act of 1984, which was later incorporated into the Trade and Tariff Act of 1984, for a definition of "good cause." The Report states that "[g]ood cause could be such factors as a significant issue of law or fact, changed or special circumstances, discrepancies found in previous verifications, or the likelihood of a significant impact on the result." H.R. Rep. No. 725, 98th Cong., 2d Sess. 43 (1984). Torrington argues that anytime these or comparable circumstances are shown to exist verification is required. *Torrington's Memorandum* at 16–19.

Torrington argues that the analysis of FAG's cost response that it presented to the ITA showed that discrepancies in the response proved that good cause existed for verification of FAG's cost response. *Id.* at 14–16. Torrington points out that FAG used a new cost accounting system to report costs for this administrative review and that the ITA has conducted verification in situations where a respondent used a new cost accounting system. *Id.* at 18 (*citing Final Determination of Sales at Less Than Fair Value: New Steel Rail, Except Light Rail, From Canada,* 54 Fed. Reg. 31,984 (1989)). Torrington argues that at a minimum the ITA should have conducted a modified form of verification of FAG's cost response in Washington, D.C. *Id.* at 19–20.

Defendant argues that Torrington failed to show that good cause for verification of FAG's cost response existed. Defendant argues that the ITA correctly requires more than mere speculation by a party requesting verification in order for the ITA to find that good cause for verification exists. Defendant argues that ITA will not find good cause to verify if a request to verify is made prior to the submission of the data to be verified. Defendant also argues that the ITA will not find good cause to verify if the ITA finds that a respondent has addressed any perceived deficiencies in its responses and the party requesting verification has not shown that any remaining deficiencies will have an impact on dumping margins. *Defendant's Memorandum* at 41–42, 45–46.

Specifically, defendant argues that the ITA evaluated FAG's cost response, deficiency responses, its other responses and verified FAG's sales data including FAG's accounting systems and found the information submitted to be credible. AR Italy Pub. Doc. No. 225. Therefore, the ITA determined that there was no need to verify FAG's cost response. *Defendant's Memorandum* at 44.

Defendant also points out that Torrington failed to substantiate that any remaining problems with FAG's cost response would have a significant effect on FAG's dumping margin. *Id.* at 45–46.

Finally, defendant points out that the ITA did consider conducting limited verifications in Washington, D.C., but rejected the idea for logistical and procedural reasons. Defendant states that the biggest problem with conducting verifications in Washington was that the ITA could not rely on the veracity of documents submitted under such a procedure. *Id.* at 46–47.

FAG agrees with the defendant's arguments on this issue. *FAG's Memorandum* at 30–47.

In response to defendant, Torrington argues that the fact that the ITA originally scheduled verification of FAG's cost response, but canceled it at least in part due to the outbreak of the Persian Gulf War, supports Torrington's contention that good cause for verification existed. *Reply of The Torrington Company, Plaintiff, to Responses of Defendant and Defendant-Intervenors to Torrington's Motion for Judgment Pursuant to Rule 56.1* (*"Torrington's Reply"*) at 25–26.

Torrington points out that the defendant's argument that Torrington's request for verification was invalid because it was filed prior to the submission of FAG's response data is misplaced because Torrington was required by 19 C.F.R. § 353.36(a)(v)(A) to request verification within 120 days of the initiation of review, which means the request had to be filed no later than October 9, 1990. FAG's cost response was filed on October 18, 1990. *Torrington's Reply* at 26; *see* AR Italy Pub. Doc. No. 128.

Further, Torrington argues that the defendant's argument that a request for verification for good cause must substantiate the degree of impact of any alleged deficiencies in a response on a respondent's dumping margin imposes an impossible standard for showing good cause. Torrington argues that given the complexity of responses to be analyzed and the time constraints involved, it would be impossible for a domestic interested party to meet this burden. *Torrington's Reply* at 27.

Finally, Torrington argues that the defendant's argument that verification in Washington, D.C. was rejected for logistical and procedural reasons is weak. *Id.* at 28–29.

As an initial matter, this Court finds that there is no support for Torrington's contention that the ITA should have conducted limited verification in Washington, D.C.

After examining the administrative record, this Court finds that the ITA never scheduled verification of FAG's cost response in Italy. *See* AR Italy Pub. Doc. Nos. 149, 185, 218. In addition, the ITA sent FAG a deficiency letter requesting FAG to supplement its cost response in order to deal with many of the problems identified by Torrington. AR Italy Pub. Doc. No. 154. FAG provided all the information requested by the ITA. AR Italy Pub. Doc. No. 172, 182. ITA deemed FAG's cost response and supplemental submissions adequate and used FAG's cost data for the Final Results.

Torrington argues that if good cause, defined "as a significant issue of law or fact, changed or special circumstances, discrepancies found in previous verifications, or the likelihood of a significant impact on the result" or comparable circumstances, exist, the ITA is *required* to conduct verification. *See Torrington's Memorandum* at 16 (*quoting* H.R. Rep. No. 725 at 43). The above quotation represents examples of what Congress thought *could* be considered good cause. Nothing leads this Court

to the conclusion that the presence of any one of these circumstances requires the ITA to conduct verification.

Torrington argues that there were significant issues of fact in dispute in regard to FAG's cost response. However, the ITA was aware of these issues and dealt with, and resolved them, to its satisfaction. AR Italy Pub. Doc. Nos. 154, 172, 182.

However, this Court believes the ITA goes too far in arguing that a party requesting verification for good cause must be able to substantiate the degree of impact alleged problems will have on the respondent's dumping margin. All that is required is that the party requesting verification present a reasonable argument that there will be a significant impact. This does not mean that the party must exactly quantify the impact on the dumping margin.[2]

But even a showing of a potentially significant impact on dumping margins is not enough. The statute and regulations clearly leave to the ITA's discretion the determination of whether good cause for verification exists. 19 U.S.C. § 1677e(b); 19 C.F.R. § 353.36(a)(iv). If the ITA is satisfied with a respondent's data and determines that good cause to verify does not exist, and the ITA's determination is supported by substantial evidence on the administrative record, this Court will uphold the ITA's determination. 19 U.S.C. § 1516a(b)(1)(B).

As discussed above, the ITA closely examined FAG's cost response, requested additional information, and decided that good cause for verification did not exist. This Court finds that in this case the ITA's determination was supported by substantial evidence on the administrative record and is affirmed.

5. *Adjustment to FMV for FAG's Pre-sale Inland Freight:*

In the Final Results, the ITA deducted all of FAG's pre-sale movement expenses from its calculation of FMV stating:

> [W]e have determined that pre-sale inland freight should be treated as a movement expense and deducted from foreign market value. Because we do not treat pre-sale and post-sale movement charges differently in calculating an ex-factory U.S. price, we must treat these expenses in a similar manner in the home market, to ensure an equitable price-to-price comparison.

Issues Appendix, 56 Fed. Reg. at 31,715.

Torrington argues that the ITA's decision to deduct all presale movement expenses from FMV is contrary to past ITA practice and the decision of this court in *Silver Reed America. Inc. v. United States,* 7 CIT 23, 34–35, 581 F. Supp. 1290, 1298–99 (1984), *rev'd on other grounds sub nom. Consumer Prods. Div., SMC Corp. v. Silver Reed America, Inc.,* 753 F.2d 1033 (Fed. Cir. 1985). *Torrington's Memorandum* at 26–27. Torrington argues that the ITA is making this adjustment pursuant to

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[2] In certain cases a significant impact could be 0.01% if it means the difference between assessment of duties and having a *de minimis* margin.

its authority to adjust FMV for differences in circumstances of sales. *See* 19 U.S.C. § 1677b(a)(4)(B) (1988); 19 C.F.R. § 353.56(a) (1991).

Specifically, Torrington argues that in order for the ITA to make an adjustment to FMV for a difference in circumstance of sale, the expense at issue must be directly related to the sales being investigated. Torrington points out that the court in *Silver Reed*, 7 CIT at 34–35, 581 F. Supp. at 1298–99, upheld ITA's past practice of denying an adjustment to FMV for pre-sale expenses which could not be directly tied to sales. *Torrington's Memorandum* at 28–30. Torrington argues that *Silver Reed* is directly on point because here FAG was unable to tie its pre-sale movement charges directly to the sales under investigation. *Id.* at 29–30. Torrington argues that pre-sale home market movement expenses are general overhead expenses which cannot be directly tied to sales. *Id.*

Torrington admits that this court recently upheld the ITA's new practice of deducting all pre-sale movement expenses from FMV in *Ad Hoc Comm. of AZ-NM-TX-FL Producers of Gray Portland Cement v. United States,* 16 CIT ____, ____, 787 F. Supp. 208, 211–13 (1992), but argues that this case was wrongly decided. *Torrington's Memorandum* at 30–32.

Defendant and FAG rely on this court's decision in *Ad Hoc Comm.,* 16 CIT at ____, 787 F. Supp. at 211–13. *Defendant's Memorandum* at 56–61; *FAG's Memorandum* at 63–65.

Specifically, defendant and FAG argue that the ITA is required to deduct pre-sale movement expenses from U.S. price pursuant to 19 U.S.C. § 1677a(d)(2)(A) (1988) and 19 C.F.R. § 353.41(d)(2)(i) (1991), in order to arrive at an ex-factory price for U.S. sales. The statute and regulations do not address the deduction of presale expenses from FMV. Defendant points out that by not deducting pre-sale expenses from FMV, which was the ITA's past practice, the ITA unfairly compared an ex-factory U.S. price with an ex-warehouse home market price. Defendant argues that the ITA's adjustment to FMV for pre-sale movement expenses is not dependant on its authority to adjust FMV for differences in circumstances of sale, but rather upon the ITA's inherent authority to make an "apples with apples" comparison. *Defendant's Memorandum* at 57–59. Defendant points out that the ITA's rationale was recently sustained in *Ad Hoc Comm.,* 16 CIT at ____, 787 F. Supp. at 211–13.

The reasoning of this Court in upholding the ITA's treatment of pre-sale inventory carrying costs in this case is equally applicable to the ITA's treatment of pre-sale movement expenses. The ITA's decision to compare U.S. price to home market price at a contemporaneous point in the chain of commerce is reasonable. *Torrington Co.,* 17 CIT at ____, Slip Op. 93–44 at 32. In this case, the ITA has chosen an ex-factory price as the contemporaneous point in the chain of commerce. In order to make this comparison certain expenses need to be removed from both U.S. and home market prices. This Court finds nothing unreasonable in the ITA's removal of pre-sale movement expenses from both U.S. and home

market prices as measured from the same point in the chain of commerce, in this case ex-factory. *Id.* at 33–34; *Ad Hoc Comm.,* 16 CIT at ____, 787 F. Supp. at 211–13. This method of treating pre-sale home market movement expenses has also been specifically upheld by this court in a well reasoned opinion in *Nihon Cement Co. v. United States,* 17 CIT ____, ____, Slip Op. 93–80 at 30–34 (May 25, 1993).

Therefore, this Court affirms the ITA's deduction of FAG's pre-sale movement expenses from FMV.

6. *SKF's Home Market Discounts:*

In the Final Results of this administrative review, the ITA stated that in regard to discounts:

> The Department generally allows adjustments to home market price and USP for discounts and rebates where respondents have granted and paid them on sales of subject merchandise to unrelated parties during the period of review. Such discounts or rebates should be part of a respondent's standard business practice and not intended to avoid potential antidumping duty liability. The Department generally makes an adjustment if discounts and rebates, granted pursuant to accurately and adequately described programs, are properly reported on a sale or customer-specific basis and are directly associated with the products or sales under consideration.
>
> * * * * * * *
>
> SKF: SKF granted rebates on a customer-specific basis. The Department verified that rebates per customer were accrued for sales which occurred during an agreed-upon time period or up to a certain agreed-upon amount, and then paid to the customer. We traced from payments of rebates to documentation justifying why the payments were made. SKF demonstrated that its rebates were legitimate and based on agreements. For the purpose of allocating rebates for this review, SKF divided the total rebates given to each customer during a given time period by the total sales to that customer. We found the allocation of discounts and rebates by SKF-FRG, SKF-France, and SKF-Italy to be consistent and reasonable; therefore, we have not changed our calculations from the preliminary determination.

Issues Appendix, 56 Fed. Reg. at 31,717–18.

Torrington argues that discounts relate directly to price and therefore an adjustment to FMV, as the ITA made here, should not be allowed unless SKF demonstrates a direct relationship between a specific discount and a specific sale. Torrington alleges that SKF allocated discounts over all sales without showing that each individual sale was subject to a discount. Torrington argues that allocation is allowed only when a respondent shows on the record that all sales of the subject merchandise were eligible for, and received, a discount. *Torrington's Memorandum* at 32–38.

Defendant concedes that it incorrectly treated SKF's home market discounts as directly related expenses to be deducted from FMV. Defen-

dant states that this Court's decision in *Koyo Seiko Co. v. United States*, 16 CIT ____, ____, 796 F. Supp. 1526, 1529–30 (1992), requires that direct selling expenses be shown to have a reasonably direct relationship to the sales under consideration. Defendant alleges that this direct relationship was not demonstrated if discounts were incurred on a transaction-specific basis but were allocated over all sales on a customer-specific basis as SKF did here. Therefore, defendant requests this Court to remand this issue to the ITA "for reconsideration of those home market cash discounts that were not reported on a transaction-specific or model-specific basis and recalculation of foreign market values where warranted * * *." *Defendant's Memorandum* at 61.

SKF states that it used two different methodologies to report home market discounts: one for SKF Cuscinetti and one for SKF Industrie, S.p.A. For SKF Cuscinetti, SKF states that discounts were available to all customers. SKF states:

> "[t]otal sales under these three payment terms were divided by the cash discounts granted for the sales to yield a cash discount rate." AR (Pub.) Doc. 222 at 7. For these rates to match those set forth in the payment terms, as they do, all customers eligible for the discounts indeed must have been granted such discounts. Accordingly, the discounts granted and reported by Cuscinetti are directly related to the reported sales for which cash discounts were claimed.
>
> * * * For Industrie, as explained by SKF, total cash discounts granted in the home market were divided by total home market sales for: a) the second half of 1988, b) full-year 1989, and c) the first four months of 1990. The resultant factors were then multiplied by the price to derive the per unit cash discount value reported by Industrie in its sales response.

SKF's Opposition at 17–18. SKF admits that it allocated all home market discounts for SKF Industrie, S.p.A. over all home market sales due to the manner in which SKF Industrie, S.p.A.'s records were kept. *Id.*

SKF argues that it was reasonable for the ITA to accept SKF's methods of reporting discounts and requests this Court to sustain the ITA's actions in regard to this issue.

In addition, SKF argues that it has been caught by surprise by the defendant's change of position on this issue. SKF argues that there is no statutory basis for the defendant to change its position in regard to its final administrative determination after judicial review of that determination has commenced. *Reply Brief of SKF USA Inc. and SKF Industrie, S.p.A.* (*"SKF's Reply"*) at 3–4. SKF argues that the ITA's unilateral decision to reverse its position in regard to SKF's discounts denied SKF due process by not allowing SKF the opportunity to comment on the ITA's new position and possibly correct problems with its information submission. *Id.* at 5–7.

SKF argues that the ITA's articulation of a new standard in regard to granting adjustments for discounts which will be given retroactive effect was unfair and unlawful. SKF points out that retroactive applica-

tion of the law is frowned upon, citing *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204 (1988). *SKF's Reply* at 7–10.

SKF also argues that it has relied on the ITA's previous position on this issue in its efforts to try to eliminate dumping by the company. The change in ITA's position may result in the creation of dumping margins during the second, third and part of the fourth administrative reviews which would not have existed under the ITA's old methodology. *SKF's Reply* at 10–16.

SKF argues that *Koyo Seiko,* 16 CIT at ____, 796 F. Supp. at 1529–30, does not invalidate the reporting methodology used by SKF for discounts. *SKF's Reply* at 16–18.

SKF argues that the ITA's new transaction-specific standard should be rejected. *Id.* at 20–22. However, if this Court finds the ITA's new standard to be reasonable and in accordance with law, SKF requests the Court to determine that SKF has met the new standard. *Id.* at 22–24. At a minimum, SKF requests this Court to direct the ITA to allow an indirect adjustment to FMV for SKF's discounts. *Id.* at 24–25.

Torrington argues that it is well settled that the ITA may request a remand to correct errors in its application of the law as well as other types of clerical errors. *Surreply of The Torrington Company to the Reply Brief of the SKF Companies.*

As an initial matter, this Court finds that SKF's argument that the defendant is precluded from requesting a remand when it believes that it has incorrectly applied the law is completely without foundation. As this court has stated:

> The law is clear that remand is appropriate where an agency has followed an improper method in making a determination or where there has been a defect in the agency's finding. *See, e.g., Ford Motor Co. v. NLRB,* 305 U.S. 364, 374–75 (1939); *Greene County Planning Bd. v. Federal Power Comm'n,* 559 F.2d 1227 (2d Cir. 1977) (en banc), *cert. denied,* 434 U.S. 1086 (1978).

Timken Co. v. United States, 7 CIT 319, 320 (1984).

As to the merits of this issue, the Court of Appeals for the Federal Circuit has stated that in order for a discount or rebate to qualify as a direct cost to be subtracted from FMV, the discount or rebate must have been actually paid on all of the sales under consideration and allocated on the basis of actual cost and sales figures. *Smith-Corona Group v. United States,* 713 F.2d 1568, 1580 (Fed. Cir. 1983), *cert. denied,* 465 U.S. 1022 (1984). In *Koyo Seiko,* 16 CIT at ____, 796 F. Supp. at 1530, this Court upheld the ITA's treatment of Koyo Seiko Co., Ltd.'s ("Koyo Seiko") post sale price adjustments as indirect selling expenses because these post sale price adjustments could not be directly correlated with sales of the subject merchandise using verified cost and sales information. In addition, this Court has found that rebates paid on out of scope merchandise may not be used in the calculation of deductions for expenses from FMV for in-scope merchandise. *Torrington Co.,* 17 CIT at ____, Slip Op. 93–44 at 38–39.

The statute and the ITA have a preference for respondents to provide actual expense information as opposed to allocated expense information. As a result, the ITA generally gives respondents an incentive to provide the ITA with actual expense information. The ITA does this by classifying actual expense information in a way which gives greater benefit to the respondent and classifying allocated information in a way which gives a respondent less benefit. This can lead to differing treatment of the same kind of expenses in the calculation of USP and FMV.

A respondent benefits by having home market expenses characterized as direct because generally FMV will be adjusted only for direct expenses. 19 U.S.C. § 1677b(a)(4)(B); *Consumer Prods. Div.,* 753 F.2d at 1037–38. If the respondent fails to meet the standard for receiving a direct adjustment to price for its home market expenses, the expense will be treated as an indirect expense because this treatment is adverse to the respondent. 19 C.F.R. § 353.56(b)(2) (1991) (indirect selling expenses deducted from FMV only in relation to ESP transactions and only up to amount of indirect selling expenses deducted from USP). Allocated expenses in the U.S. market are treated as direct expenses because direct expenses will be deducted from all USP transactions which will, therefore, reduce USP and potentially increase dumping margins. 19 U.S.C. § 1677a(d)(2)(A) (1988). If these expenses were treated as indirect expenses, they would only be deducted from USP in regard to ESP transactions and will, therefore, reduce USP and potentially increase the dumping margin only for ESP transactions. 19 U.S.C. § 1677a(e)(2) (1988). Therefore, treatment of these expenses as indirect expenses would destroy any incentive a respondent has to provide the ITA with actual expense information. *Defendant's Memorandum* at 62–64. This court has affirmed this method of providing an incentive for respondents to provide actual expense information. *Timken Co. v. United States,* 11 CIT 786, 804, 673 F. Supp. 495, 512–13 (1987).

It is clear that discounts can be deducted from FMV if the actual expense information is reported to the ITA on a transaction-specific or product-specific basis. 19 U.S.C. § 1677b(a)(4)(B). It is also clear that discounts paid on the subject merchandise can be allocated over all sales of the subject merchandise as long as discounts paid only on the subject merchandise are used to calculate the per-unit amount of discount to be deducted and the discounts "can be directly correlated with specific merchandise using verified cost and sales information." *Smith-Corona,* 713 F.2d at 1580. If a respondent is unable to provide the ITA with transaction-specific or product-specific discount amounts, the ITA must look to the information provided by the respondent to determine if the reported allocated discounts were only made on and allocated to sales of the subject merchandise and can be tied to verified cost and sales data. In order for the ITA to accept discounts or rebates allocated on a customer-specific basis as direct costs, the percentage amount of each discount or rebate paid must be the same for each type of the subject merchandise sold and the total amount of discounts or rebates paid to

each customer must be allocated over all sales of the subject merchandise made to that customer. If this relationship is not shown to the satisfaction of the ITA, but the aggregate amounts of discounts paid on the subject merchandise have been verified, the discounts are to be treated as indirect selling expenses. *Koyo Seiko,* 16 CIT at ___, 796 F. Supp. at 1530.

Therefore, this Court remands this issue to the ITA to determine if SKF's two methods of reporting discounts in the home market for SKF Cuscinetti and SKF Industrie, S.p.A. meet the standard required for those discounts to be treated as direct selling expenses and subtracted from FMV. If the information on the administrative record does not support treatment of these discounts as direct expenses, the ITA will treat these discounts as indirect selling expenses since the ITA has already verified the total amounts in question. AR Italy Pub. Doc. 222. In addition, this Court cannot tell on the basis of the administrative record if discounts paid on SKF's sales of out of scope merchandise were used in the calculation of the adjustment to FMV for SKF's home market sales discounts. This Court cannot allow the ITA to use a methodology which allows for the inclusion of discounts paid on out of scope merchandise in calculating adjustments to FMV and ultimately the dumping margins. *Torrington Co.,* 17 CIT at ___, Slip Op. 93–44 at 38–39. Therefore, upon remand the ITA is directed to develop a methodology which removes discounts paid on sales of out of scope merchandise from any adjustments made to FMV for discounts or, if no viable method can be developed, to deny such an adjustment in its calculation of FMV.

7. *FAG's U.S. Market Discounts:*

In regard to FAG's U.S. market discounts, the ITA accepted FAG's allocation of discounts on a customer-specific basis but treated them as direct costs to be fully deducted from U.S. price as this treatment was adverse to FAG. *Issues Appendix,* 56 Fed. Reg. at 31,717.

Torrington argues that, for the reasons stated above in regard to SKF's home market discounts, since FAG's U.S. market discounts were not reported on a transaction-specific basis, the ITA should have rejected FAG's U.S. market discount information and should instead have used the highest actual discount paid on any U.S. sale as best information available. Torrington argues that the use of the ITA's current methodology may under-allocate discounts on some sales of the subject merchandise. *Torrington's Memorandum* at 38–40.

Defendant repeats its argument that when dealing with an expense such as a discount which is allocated on a customer-specific basis, the ITA's treatment of that expense depends on whether the expense is a home market or U.S. market expense. As stated above, allocated expenses in the U.S. market are treated as direct expenses because direct expenses will be deducted from all USP transactions which will, therefore, reduce USP and potentially increase dumping margins. 19 U.S.C. § 1677a(d)(2)(A).

Defendant argues that this method of treating discounts is actually the drawing of an adverse inference through the use of the best information available rule and is reasonable and in accordance with law. 19 U.S.C. § 1677e (1988); *Defendant's Memorandum* at 63–64.

FAG argues that the ITA verified its U.S. market discount information and that the ITA's acceptance of FAG's allocation methodology and treatment of these expenses as direct costs was supported by substantial evidence on the administrative record and in accordance with law. Furthermore, FAG argues that its allocation methodology leads to the same results as the use of the allocation methodology approved in *Smith-Corona,* 713 F.2d at 1580. *FAG's Memorandum* at 69–76.

As discussed above, if a respondent allocates expenses on a customer-specific basis and does not meet the requirements of *Smith-Corona,* 713 F.2d at 1580, the ITA is allowed to make an adverse inference and treat the expenses in such a way as to encourage the respondent to submit actual expense information in the future. In this case, FAG has allocated its payments of discounts in the U.S. market on a customer-specific basis. AR Italy Pub. Doc. No. 106. There is no contention that FAG has used the same allocation methodology as the one approved in *Smith-Corona* even though FAG alleges that the end result of the two methods is the same. Therefore, the ITA was correct to treat FAG's discounts in the U.S. market as direct selling expenses. However, once again this Court cannot tell from the administrative record whether discounts paid on out of scope merchandise were used to calculate the adjustment to USP for FAG's discounts. Therefore, this issue is remanded to the ITA to develop a methodology which removes discounts paid on FAG's sales of out of scope merchandise from any adjustments made to USP for discounts or, if no viable method can be developed, to deny such an adjustment in its calculation of USP. *Torrington Co.,* 17 CIT at ____, Slip Op. 93–44 at 38–39.

CONCLUSION

In accordance with the foregoing opinion, this case is remanded to the ITA to add the full amount of VAT paid on each sale in the home market to FMV without adjustment; to determine if SKF's two methods of reporting discounts in the home market for SKF Cuscinetti and SKF Industrie, S.p.A. meet the standard required for those discounts to be treated as direct selling expenses and subtracted from FMV or if information on the administrative record does not support deduction as direct expenses, to treat these discounts as indirect selling expenses; to develop a methodology which removes discounts paid on sales of out of scope merchandise from any adjustments made to FMV for SKF's discounts or, if no viable method can be developed, to deny such an adjustment in its calculation of FMV; and to develop a methodology which removes discounts paid on FAG's sales of out of scope merchandise from any adjustments made to USP for discounts or, if no viable method can be developed, to deny such an adjustment in its calculation of USP. ITA's determination is affirmed in all other respects. Remand results

are due within sixty (60) days of the date this opinion is entered. Any comments or responses by the parties to the remand results are due within thirty (30) days thereafter. Any rebuttal comments are due within fifteen (15) days of the date responses or comments are due.

(Slip Op. 93–126)

MIAMI FREE ZONE CORP., PLAINTIFF *v.* UNITED STATES, DEFENDANT

Court No. 91–12–00878

Plaintiff challenges a decision by the United States Customs Service to assess liquidated damages for violating foreign-trade zone operator conditions in 19 C.F.R. § 113.73 (1988). Defendant moves to dismiss plaintiff's action for failure to state a claim upon which relief can be granted.

Held: Defendant's motion to dismiss is granted on the grounds that the Court lacks subject matter jurisdiction.

(Dated July 9, 1993)

Andrew M. Parish, P.A. (*Andrew M. Parish, Mark Graham Hanson,* and *Barry M. Boren*), for plaintiff.

Frank W. Hunger, Assistant Attorney General of the United States; *Joseph I. Liebman,* Attorney-in-Charge, International Trade Field Office, Commercial Litigation Branch, Civil Division, United States Department of Justice (*Mark S. Sochaczewsky*); *Glenda E. Drinkhahn,* Assistant Regional Counsel, United States Customs Service, of counsel, for defendant.

OPINION AND JUDGMENT

CARMAN, *Judge:* Defendant moves pursuant to USCIT R. 12(b)(5) to dismiss plaintiffs action for failure to state a claim upon which relief can be granted. Plaintiff commenced this action in order to challenge a decision by the United States Customs Service to assess liquidated damages against plaintiff pursuant to 19 C.F.R. §§ 113.73, 146.4(a), (c), (e), 146.53(c)(1)–(2) (1988). Plaintiff bases jurisdiction upon 28 U.S.C § 1581(i) (1988).

I. BACKGROUND

Plaintiff Miami Free Zone Corporation (plaintiff or MFZC) operates a foreign-trade zone (FTZ) in Miami, Florida known as the Miami Free Zone (MFZ) pursuant to 19 U.S.C. §§ 81a–81u (1988 & Supp. II 1992) and 19 C.F.R. § 113.73 (1992). Def's Mem at 1. On or about March 27, 1987, one of plaintiff's tenants, Electronic Trade Center, imported Sony video cassette recorders into the United States and transported the recorders to the MFZ. Agency Rec. Doc. Q. On April 2, 1987, 1100 of the recorders were stolen from the premises of the MFZ. Pl's Compl at 4. The aggregate value of the stolen property totaled $245,300.00 based on a per unit value of $223.00. Agency Rec. Doc. Q. The applicable duties, equal to 4.1% *ad valorem,* amounted to $10,057.30. Def's Mem at 2.

The United States Customs Service (Customs) subsequently determined that plaintiff violated the FTZ operator bond conditions set forth in 19 C.F.R. § 113.73 in connection with the theft from the FTZ. Agency Rec. Doc. P. In particular, Customs found that plaintiff did not adequately (1) supervise storage conditions in the FTZ, (2) safekeep merchandise admitted into the FTZ, or (3) maintain the security of the merchandise located in the FTZ as required by 19 C.F.R. § 146.4(a), (c), (e). Customs also found that plaintiff was liable for the merchandise shortage occasioned by the theft and the duty and taxes owed on the merchandise pursuant to 19 C.F.R. § 146.53(c)(1)–(2). *Id.* Based on these violations, Customs assessed liquidated damages against plaintiff in the amount of $255,357.00, the sum of the stolen merchandise's aggregate value and applicable duties rounded down to the nearest dollar. *Id.*

On April 5, 1988, plaintiff petitioned Customs to cancel or mitigate the assessed liquidated damages pursuant to 19 U.S.C. § 1618 (1988). *See* Agency Rec. Doc. O. In its petition, plaintiff detailed the supervisory and security measures plaintiff had implemented prior to the theft. *Id.* at 4–6. Plaintiff claimed these measures satisfied its regulatory duty of care and, therefore, the theft was a superseding intervening event which precluded plaintiff's liability. *Id.* at 5–6. In addition, plaintiff asserted that because it had conformed with Customs' supervisory and security requirements, imposing liquidated damages would enhance Customs' revenues without ensuring compliance with Customs' law and regulations. *Id.* at 7. Plaintiff argued that imposing damages in this instance would violate Customs' general policy of imposing liquidated damages to ensure compliance, citing Customs Directive 3210–12(3)(A). *Id.*

In response to plaintiffs petition, Customs reaffirmed its earlier determination that plaintiff was negligent. *See* Agency Rec. Doc. N at 2. Nevertheless, Customs agreed to cancel the liquidated damages if plaintiff paid $51,071.40, an amount equal to twenty percent of the original liquidated damages. *Id.* at 3.

Plaintiff subsequently filed a supplemental petition with Customs on February 21, 1989. *See* Agency Rec. Doc. M. In its supplemental petition, plaintiff asked Customs to reconsider its earlier finding that plaintiff had been negligent and its decision to assess damages. *Id.* at 1–4. In sum, plaintiff claimed that its actions with respect to its supervisory and security duties warranted Customs to cancel its claim for damages against plaintiff. *Id.* at 4.

After plaintiff filed its supplemental petition, the Miami District Director referred plaintiff's case to the Director of Customs' Entry Procedures and Penalties Division (EPPD) in Washington, D.C. *See* Agency Rec. Doc. M. The District Director recommended that Customs cancel the original liquidated damages upon payment of $49,060.00, an amount equal to twenty percent of the value of stolen merchandise, rather than $51,071.40 – a figure equal to twenty percent of the sum of

merchandise's value and applicable duties. *Id.* at 2. The EPPD Director found that plaintiff was negligent and accepted the District Director's recommendation that Customs cancel the original liquidated damages upon payment of $49,060. Agency Rec. Doc. K.

Following the decision by the EPPD Director, plaintiff continued to seek additional mitigation from Customs. Counsel for plaintiff met with the Miami-based officer of the Fines, Penalties, and Forfeiture Division (FPF). Def's Mem. at 4. In response to this meeting, the FFP officer declined to recommend any amendment to the decision reached by the Washington director. Agency Rec. Doc. J. Counsel for plaintiff then submitted additional information that detailed MFZC's security measures. *See* Agency Rec. Doc. I. The Miami Customs office referred these submissions to the EPPD Director in Washington, D.C. Def's Mem. at 5. After making its submissions and prior to receiving the RPPD Director's response, plaintiff, through counsel, made an offer of compromise and tender to Customs for the amount of $10,057.00 "in full settlement of the damage claim." Agency Rec. Doc. I.

On September 5, 1990, the RPPD Director issued a new ruling stating that Customs would cancel its claim for liquidated damages upon payment of $5,000.00 as a mitigated penalty and $10,057.30 for the duties owed on the stolen merchandise.[1] Agency Rec. Doc. H. The ruling also rejected plaintiff's offer of compromise and required plaintiff to pay the remaining $5,000.00 penalty within 30 days after the date of Customs' notification letter (September 13, 1990). *Id.* On October 12, 1990, plaintiff paid $5,000.00 in accordance with the September 5, 1990 ruling. Agency Rec. Doc. F.

After making payment to Customs, plaintiff filed a second supplemental petition on January 3, 1991. *See* Agency Rec. Doc. D. In its petition, plaintiff argued that it was not liable for its tenant's negligence and that Customs should cancel the liquidated damages portion of the penalty previously assessed. *Id.* at 1. Specifically, plaintiff urged that because its tenant's negligence was "earlier in time," the government had no claim against plaintiff. *Id.* at 2 (emphasis omitted). In addition, plaintiff appears to suggest that because its tenant may have misrepresented to plaintiff the contents of the containers from which the merchandise was stolen, plaintiff should not be liable. *Id.* at 3–4.

On July 15, 1991, Customs denied plaintiff's second petition. Agency Rec. Doc. A. In short, Customs reaffirmed its earlier finding that plaintiffs own negligence contributed to the theft at the FTZ and rejected the argument that plaintiff's tenant's negligence barred all claims against plaintiff. *Id.* at 2–3. Customs also indicated that while the negligence of plaintiff's tenant mitigated the amount of liquidated damages owed by plaintiff, such negligence did not warrant canceling the damages because plaintiff's own negligence contributed to the loss. *Id.* at 3.

[1] The new ruling indicates that one of plaintiff's tenants, Electronics Trade Center, was also negligent and that the tenant's negligence contributed to the theft. The ruling appears to suggest that because plaintiff's tenant was negligent, plaintiff was entitled to an additional mitigation of damages. Agency Rec. Doc. H.

Plaintiff then commenced this action in the Court of International Trade (CIT) in order to recover the $15,057.30 paid as mitigated damages plus interest. Plaintiff's complaint asks this Court to determine whether the government's finding that the plaintiff was negligent was correct and whether the penalties imposed were appropriate. Pl's Mem at 2. This case is before the Court on defendant's motion under USCIT R. 12(b)(5) to dismiss plaintiff's action for failure to state a claim upon which relief can be granted.

II. Contentions of the Parties

Defendant advances two closely-related arguments in support of its position. First, defendant contends that because plaintiff chose to initiate administrative mitigation procedures and pay the amount of damages assessed under these procedures, plaintiff does not have any basis upon which to bring suit. Def's Mem. at 6–8. In essence, defendant asserts that the mitigation offered by Customs and its acceptance by plaintiff constituted an accord and satisfaction which extinguished any claim that plaintiff may have had against Customs. *Id.* at 8.

Defendant's second contention is that the CIT lacks subject matter jurisdiction over the case. *Id.* at 9; Def's Ans at paragraph 1. According to defendant, because the accord and satisfaction reached between plaintiff and Customs completely resolved the dispute between the parties, this case does not present a "protestable event" which could vest jurisdiction in this Court."[2] Def's Mem at 9.

Plaintiff contends that no accord and satisfaction arose between the parties that would preclude plaintiff from bringing suit. Pl's Mem at 2–3. Plaintiff maintains that an accord and satisfaction could only have arisen in this case if plaintiff had waived its right to secure judicial review of Custom's decision "as a condition of receiving the mitigation." *Id.* at 3. According to plaintiff, because plaintiff never waived its right to secure judicial review and the mitigation statute does not condition the allowance of mitigation on such waivers, the parties did not reach an accord and satisfaction that would bar judicial review. *Id.* Plaintiff argues further that a denial of judicial review in this case and the loss of the attendant opportunity of receiving a court-ordered penalty refund would deprive plaintiff of its property without due process of law. *Id.* at 4.

III. Discussion

The threshold issue presented by this case is whether the CIT has subject matter jurisdiction to review a challenge against a penalty imposed by Customs pursuant to 19 C.F.R § 113.73 and mitigated under

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[2] Defendant seems to suggest that plaintiff's action is akin to an action brought pursuant to 28 U.S.C. § 1581(a) (1988) to contest the denial of a protest made under 19 U.S.C § 1514 (1988). Defendant also appears to argue that because plaintiff could not have protested the mitigated damages assessment and brought suit in the CIT, plaintiff can not invoke the CIT's residual jurisdiction under 28 U.S.C. § 1581(i) to create a cause of action that would not otherwise exist.

19 U.S.C. § 1618.[3] Plaintiff claims the Court has jurisdiction under 28 U.S.C. § 1581(i) to review such challenges. Section 1581(i) provides as follows:

> (i) In addition to the jurisdiction conferred upon the Court of International Trade by subsections (a)–(h) of this section and subject to the exception set forth in subsection (j) of this section, the Court of International Trade shall have exclusive jurisdiction of any civil action commenced against the United States, its agencies, or its officers, that arises out of any law of the United States providing for—
>
> (1) revenue from imports or tonnage;
>
> (2) tariffs, duties, fees, or other taxes on the importation of merchandise for reasons other than the raising of revenue;
>
> (3) embargoes or other quantitative restrictions on the importation of merchandise for reasons other than the protection of the public health or safety; or
>
> (4) administration and enforcement with respect to the matters referred to in paragraphs (1)–(3) of this subsection and subsections (a)–(h) of this section.
>
> This subsection shall not confer jurisdiction over an antidumping or countervailing duty determination which is reviewable either by the Court of International Trade under section 516A(a) of the Tariff Act of 1930 or by a binational panel under article 1904 of the United States-Canada Free-Trade Agreement and section 516A(g) of the Tariff Act of 1930.

Customs Court Act of 1980, Pub. L. No. 96–417, 94 Stat. 1728, as amended, 28 U.S.C. § 1581(i) (1988). For the reasons which follow, the Court concludes that 1581(i) does not provide the CIT with subject matter jurisdiction to review a challenge against a penalty imposed by Customs pursuant to 19 C.F.R. § 113.73 and mitigated under 19 U.S.C § 1618.

In *ITT Semiconductors v. United States,* this Court expressly rejected the contention that the CIT has jurisdiction to review a challenge against a penalty imposed by Customs pursuant to 19 U.S.C. § 1592 and mitigated under 19 U.S.C. § 1618. 6 CIT 231, 237, 576 F. Supp. 641, 646 (1983). There, plaintiff predicated jurisdiction on 28 U.S.C § 1581(a), or, in the alternative, 28 U.S.C. § 1581(i). The Court held that it lacked jurisdiction under § 1581(a) because the mitigated penalty imposed and payment made therefor was not a charge or exaction subject to protest that could, in turn, give the CIT jurisdiction under § 1581(a). *Id.,* 576 F. Supp. at 646. The Court also held that it lacked jurisdiction under § 1581(i) because jurisdiction under subsection (i) would have created a

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[3] 19 U.S.C. § 1618 provides for the following in relevant part:

> Whenever any person interested in any vessel, vehicle, aircraft, merchandise, or baggage seized under the provisions of this chapter, or who has incurred, or is alleged to have incurred, any fine or penalty thereunder, files with the Secretary of the Treasury * * * a petition for the remission or mitigation of such fine, penalty, or forfeiture, the Secretary of the Treasury, * * * if he finds that such fine, penalty, or forfeiture was incurred without willful negligence or without any intention on the part of the petitioner to defraud the revenue or to violate the law, or finds the existence of such mitigating circumstances as to justify the remission or mitigation of such fine, penalty; or forfeiture, may remit or mitigate the same upon such terms and conditions as he deems reasonable and just, or order discontinuance of any prosecution relating thereto * * * .

cause of action that would not have otherwise existed under § 1581's other subsections. *Id.,* 576 F. Supp. at 646 (citing *Montgomery Ward & Co. v. Zenith Radio Corp.,* 69 CCPA 96, 106, 673 F.2d 1254, 1261 (1982)) (other citation omitted). While not fully explicated, the *ITT* court's holding with respect to § 1581(i) turned on the premise "that 28 U.S.C. § 1581(i), standing alone, can give [a] plaintiff no greater rights than those which it possessed prior to enactment of the Customs Court Act of 1980." *Carlingswitch, Inc. v. United States,* 5 CIT 70, 73, 560 F. Supp. 46, 49 (1983). In the instant case, plaintiff has not presented any basis for its claim that the CIT has jurisdiction under 28 U.S.C. § 1581(i). Instead of addressing the issue of whether the CIT has the statutory authority to review its claims, plaintiff appears to proceed on the assumption that the Court has such authority and argues only that it never waived its right to invoke the Court's authority in the mitigation proceedings. Nothing in plaintiff's papers convinces the Court that it should abandon the rationale relied upon in *ITT* and explained in *Carlingswitch.* In short, as in *ITT,* allowing the plaintiff in this case to proceed under § 1581(i) would create a cause of action in this Court that would not otherwise exist. As a result, the Court finds that it lacks jurisdiction under § 1581(i).

Even assuming penalties imposed by Customs pursuant to 19 C.F.R. § 113.73 and mitigated under 19 U.S.C. § 1618 were subject to judicial review, plaintiff has failed to demonstrate why *this Court* is the proper forum to review such matters. The Court of Appeals for the Federal Circuit recently held that a decision by Customs to impose a penalty in § 1618 mitigation proceedings is subject to judicial review where the plaintiff challenges the legality of the underlying penalty and has paid the penalty under protest. *Trayco, Inc. v. United States,* Slip Op 92–1406 at 16–17 (Fed. Cir. June 3, 1993). Customs imposed the penalty at issue in *Trayco* pursuant to 19 U.S.C. § 1592 after plaintiff allegedly failed to mark properly the country of origin on certain imported merchandise as required by 19 U.S.C. § 1304(a) (1988). *Id.* at 1–5. In contrast to claims which challenge the *legality* of an underlying penalty that gives rise to mitigation proceedings, the Federal Circuit noted that claims which challenge the *merits* of a decision denying a petition for mitigation under § 1618 are not subject to judicial review. *Id.* at 14. With respect to the issue of which court had jurisdiction to review claims challenging the validity of a penalty, the *Trayco* court "conclude[d] that a gap exists in the Court of International Trade's exclusive jurisdiction for an action brought by an importer against the United States for refund of a penalty improperly assessed and exacted under 19 U.S.C § 1592(a), (c)." *Id.* at 7. As a result, the Federal Circuit found that the CIT lacked subject matter jurisdiction to hear plaintiff's claims. *Id.* at 8. As applied to this case, *Trayco* indicates that although plaintiff's claims may be subject to judicial review,[4] this Court lacks jurisdiction to address them.

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[4] Because the Court concludes that it lacks subject matter jurisdiction, the Court does not reach the merits of the case. As a result, the Court expressly refrains from characterizing plaintiffs claim as being either related to the underlying penalty or the merits of the decisions reached in the mitigation proceedings.

Notwithstanding the conclusion reached, the Court observes that the jurisdictional issue presented in this case further demonstrates the need for Congress to re-examine the CIT's jurisdictional mandate. As the Federal Circuit noted in *Trayco*, "Congress did not fully explain, and neither can we, why certain customs-related matters are excluded from the jurisdiction of the Court of International Trade." *Id.* at 10 (citing *K Mart Corp. v. Cartier, Inc.*, 485 U.S. 176, 189 (1988)). Similar to the penalty at issue in *Trayco*, the penalty at issue in this case is clearly "customs-related" and would benefit from the national standards that the CIT provides. Nevertheless, as previously noted, because the Court does not have the explicit statutory authority necessary to review a penalty imposed by Customs under 19 C.F.R. § 113.73, the Court finds that it lacks subject matter jurisdiction. If changes in the CIT's jurisdiction are to be made, they will have to be made by the legislative branch.

IV. Conclusion

The Court holds that defendant's motion to dismiss is granted on the grounds that the Court lacks subject matter jurisdiction.

(Slip Op. 93–127)

United States, plaintiff *v.* Hanover Insurance Co., defendant

Court No. 92–11–00733

Plaintiff filed this action to collect unpaid supplemental duties from defendant, a surety. Defendant moves to dismiss on the ground that the statute of limitations has run.

Held: The right of action accrued when the principal breached the bond by its failure to pay the duties. The action is dismissed because it is time-barred.

[Judgment for defendant.]

(Decided July 9, 1993)

Frank W. Hunger, Assistant Attorney General, *Joseph I. Liebman*, Attorney in Charge, International Trade Field Office, Civil Division, United States Department of Justice (*Susan Burnett Mansfield*), *Darlene M. Stephens* (*United States Customs Service*), of counsel, for plaintiff.

Sandler, Travis & Rosenberg, P.A. (*Gilbert Lee Sandler, Ronald W. Gerdes, Arthur K. Purcell*) for defendant.

Memorandum Opinion

DiCarlo, *Chief Judge:* Plaintiff, the United States, brings this action under 28 U.S.C. § 1582(2) (1988) to collect unpaid supplemental duties and interest from defendant, The Hanover Insurance Company, as surety of two entry bonds. Defendant moves to dismiss arguing this action is barred by the six-year statute of limitation under 28 U.S.C. § 2415(a) (1988). At issue is when plaintiff's right of action accrued trig-

gering the statute of limitation. The court holds that plaintiff's right of action accrued when the bonds were breached by the principal. Since this action was filed more than six years after the bonds were breached, it is time-barred.

BACKGROUND

On February 19, 1976 and March 10, 1977, Gambles Import Corporation, as principal, and defendant, as surety, executed two General Term Bonds for Entry of Merchandise, Customs Form 7595. The two bonds contain identical terms, each in the amount of $300,000 and covering entries for a one-year period. This action involves twenty-two entries covered by these bonds. Customs liquidated seventeen of the twenty-two entries on August 29, 1986 and the remaining five entries on September 12, 1986. The bills for supplemental duties were sent to the principal on the respective dates of liquidation. The principal never paid the duties. Customs made demands for payment upon defendant as surety in January 1988 and September 1988. On November 10, 1992, plaintiff filed this action.

DISCUSSION

The parties agree that the applicable statute of limitation is six years under 28 U.S.C. § 2415(a), which provides, *inter alia:*

> [E]very action for money damages brought by the United States or an officer or agency thereof which is founded upon any contract express or implied in law or fact, shall be barred unless the complaint is filed within six years after the right of action accrues or within one year after final decisions have been rendered in applicable administrative proceedings required by contract or by law, whichever is later * * * .

Defendant moves to dismiss contending that plaintiff's right of action to collect supplemental duties accrued when the principal breached the bond, which occurred when it failed to pay the duties 15 days after the date of liquidation in accordance with 19 U.S.C. § 1505(c). The statute provides:

> Duties determined to be due upon liquidation or reliquidation shall be due 15 days after the date of that liquidation or reliquidation, and unless payment of the duties is received by the appropriate customs officer within 30 days after that date, shall be considered delinquent and bear interest from the 15th day after the date of liquidation or reliquidation at a rate determined by the Secretary of the Treasury.

19 U.S.C. § 1505(c) (1988) (emphasis added).

The Court of Appeals for the Federal Circuit recently held: "The law is well settled that, as a general rule, a claim does not accrue until all events necessary to fix the liability of a defendant have occurred. With respect to a claim arising from a bond, it is equally well settled that the date of accrual occurs at the time of the breach of the bond." *United States v. Cocoa Berkau, Inc.,* 11 Fed. Cir. (T) ____, ____, 990 F.2d 610,

613 (1993) (citations omitted). In *Cocoa Berkau,* the court held the government's action to collect liquidated damages from the surety is time barred, because it was filed more than six years after the principal breached its bond. "Absent an agreement between the parties, the surety incurs derivative liability when the principal breaches the bond * * *. The demand made by Customs upon the surety was merely a procedural step for obtaining the damages and did not itself create liability." *Id.* at 614.

In this case, there is no agreement between the parties that the surety's obligation to pay under the bonds should arise at a different time from that of the principal's. The bonds merely provide that the principal and the surety are "jointly and severally" liable and that the "principal shall pay to the district director of customs, when demanded, all duties, taxes, and charges found legally due and unpaid" on entries covered by the bonds. *See* General Term Bond for Entry of Merchandise, para. 8. Unless the parties have agreed otherwise, the surety incurs derivative liability when the principal breaches the bond. *Cocoa Berkau,* at 614. The principal in this case breached the bonds when it failed to pay the supplemental duties 15 days after the date of liquidation. *See* 19 U.S.C. § 1505(c). Since the entries were liquidated on August 29, 1986 and September 12, 1986 respectively, plaintiff's right of action to collect these duties accrued on or about September 13 and 27 of 1986.

Plaintiff argues that, regardless of when the bonds were breached by the principal, the statutory scheme contemplates a different triggering event for the accrual of its right of action against defendant. Plaintiff relies on 19 U.S.C. § 1514(c)(2) (1988), which provides that "[a] protest by a surety which has an unsatisfied legal claim under its bond may be filed within 90 days from the date of mailing of notice of demand for payment against its bond." According to plaintiff, since § 1514(c) grants a surety the right to protest after receiving a notice of demand, a demand for payment is an event "necessary to fix the liability" of the surety. Consequently, plaintiff argues, plaintiff's right of action did not accrue until defendant failed to pay after receiving the notice of demand.

While a notice of demand gives rise to the right of a surety to protest Customs' decisions under § 1514(c), the surety's right to protest is not to be confused with the government's right of action against the surety. Section 1514 does not provide that a demand is required before the government may bring an action against the surety. Nor does plaintiff claim that legislative history indicates Congress intended such a requirement by § 1514. "Without agreement of the parties or statutory obligations delaying the institution of suit, the general rule for accrual of a right of action still applies." *United States v. Commodities Export Co.,* 10 Fed. Cir. (T) ____, ____, 972 F.2d 1266, 1271 (1992), *cert. denied,* 113 S. Ct. 1256 (1993).

In support of its position that a demand upon surety is mandated by § 1514, plaintiff relies on cases where government's action against a surety was held to be premature when the surety's protest filed under

§ 1514 was still pending before Customs. *See United States v. Bavarian Motors, Inc.*, 4 CIT 83, 86 (1982); *United States v. Desiree Int'l., U.S.A., Ltd.*, 497 F. Supp. 264, 269 (S.D.N.Y. 1980). For the purpose of statute of limitations, the question raised by these decisions is whether the protest proceedings provided by 19 U.S.C. §§ 1514, 1515 (1988) are mandatory administrative proceedings that toll the statute of limitation on government's action under 28 U.S.C. § 1582.

The answer to this question is negative according to the court's recent decision in *United States v. Ataka America, Inc.*, 17 CIT ____, Slip Op. 93–112 (June 21, 1993). In Ataka, where the government brought action against the surety to collect customs duties more than six years after the principal breached the bond, the court held that the statute of limitation on government's action was not tolled by the protest filed by the principal under 19 U.S.C. § 1514. "As to the surety, the government must sue within six years (following the fifteenth day after liquidation) regardless of whether an importer's or surety's protest deprives the assessment of duties of its final effect." *Ataka*, at 20. The court reasoned that "the right to collect immediately on liquidation carries with it the responsibility to act within six years of liquidation to collect on the contract obligation of the surety. Accordingly, since the effective date of 19 U.S.C § 1505(c), completion of protest proceedings has not been a requirement for suit to collect." *Id.* (citing *Bavarian Motors* for comparison and indicating that the case was decided before the effective date of 19 U.S.C. § 1505(c)).

Thus, while the protest proceedings under §§ 1514, 1515 are prerequisite to a surety's suit against the government, *see* 28 U.S.C. § 1581(a) (1988) (this court has exclusive jurisdiction of any civil action contesting the denial of a protest), such proceedings "are not mandatory for the purpose of government action under 28 U.S.C. § 1582." *Ataka*, at 17. Consequently, these proceedings do not toll the statute of limitation on government's action under § 1582.

This conclusion is consistent with the principle that the court "cannot 'permit a single party to postpone unilaterally and indefinitely the running of the statute of limitations.'" *Cocoa Berkau*, at 614 (quoting *Commodities Exort*, 972 F.2d at 1271). Plaintiff's position that § 1514 requires a notice of demand on surety before the government may commence a lawsuit would, in effect, permit Customs to do so. To accept plaintiff's position "would subvert the purpose of the statute of limitations, which is intended to ensure that actions are brought in a timely fashion, before they become stale." *Id.*

For the reasons stated above, the court finds that a demand on surety for payment under § 1514 is not an event "necessary to fix the liability" of the surety. Accordingly, plaintiff's argument that § 1514 mandates a separate triggering event for the accrual of government's right of action against surety must be rejected.

Plaintiff further suggests that the *Cocoa Berkau* principle concerning when the right of action accrues against surety may not be applicable to

this case. According to plaintiff, *Cocoa Berkau* involves collection of liquidated damages where the principal's and surety's obligations to pay both arise from contract and are subject to the same period of limitation; in contrast, this case concerns collection of customs duties in which the principal's obligation to pay arises under the tariff schedule and the surety's from contract. Consequently, plaintiff argues, the right of action against the surety accrues separately from that against the principal in this case.

The court decision in *Ataka,* a case on collection of duties, has made it clear that the same principle upheld in *Cocoa Berkau* applies in the case of collection of duties. *See Ataka,* at 12 ("The surety's obligation arises at the time of the principal's breach, unless the parties agree otherwise."). Plaintiff's argument does not explain why the application of different periods of limitation should render the basic principle of *Cocoa Berkau* inapplicable. Nor has plaintiff offered any authority in support of its position.

CONCLUSION

The court holds that plaintiff's right of action against defendant accrued in September 1986 when the principal breached the bonds by failing to pay the supplemental duties in accordance with 19 U.S.C. § 1505(c). Since this action was filed on November 10, 1992, more than six years after plaintiff's right of action accrued in September 1986, it is time barred under 28 U.S.C. § 2415(a).

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